Supreme Court of the United States

October Term, 1959

No. 779

CARL BRADEN,

Petitioner,

against

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

1. Petitioner has challenged the pertinency of the questions put to him. Here we note a strange discrepancy between the respective positions of the Court below and the Government. The Court below made a finding of pertinency only of questions relating to meetings at the American Red Cross Building and with Mr. Harvey O'Connor (Counts I and II and possibly III and IV; Appendix to Petition, 29-30). But this type of question is treated by the Government as "preliminary" (Brief in Opposition, pp. 7-8, ftn. 4). As such it could not be a valid basis for conviction. *Bowers* v. *United States*, 202 F. 2d 447 (C. A. D. C., 1953).

Hence, the Government points instead to a different question which it regards as clearly pertinent—"Were you a member of the Communist Party the instant you affixed your signature to that letter?" (Count V; Brief in Opposition, pp. 7-8, ftn. 4). But this question, *not* passed upon by the Court below, is precisely the kind of question which cannot be pertinent to legislation since even a Communist's

constitutional right of petition is immune from congressional control.

2. To say that "[t]his is the very type of question dealt with in *Barenblatt*" (Brief in Opposition, p. 8, ftn. 4) is to disregard the context in which the question was put in that case. Disapproval of such an approach has been expressed by this Court in cases ranging from *Hundly's Lessee* v. *Anthony*, 5 Wheat. (18 U. S.) 374, 381 to *Hughes* v. *Superior Court*, 339 U. S. 460, 465. Always "the specific situations have controlled decision." *Ibid.* *Barenblatt* was an investigation into Communist activities regarded as reprehensible (360 U. S. 109, 113, 115, 129); hence the inquiry as to whether Barenblatt was, as charged, a member. But the question put to Petitioner related to his constitutionally protected right of petition (*United States* v. *Cruikshank*, 92 U. S. 542). Would the Government argue that in an investigation of churches—a matter not foreign to this Committee [1]—the Committee was entitled to ask "Were you a member of the Communist Party the instant you attended religious services?" Such a question has no legislative purpose, it invades a constitutionally protected area, and it has no function except that of exposure.

3. The Government treats *Barenblatt* as *carte blanche* authority to investigate anything under the cry of Communism. No such intention can be found in this Court's careful analysis of the record there. Certainly, this case presents more vividly than *Barenblatt* an example of "exposure merely for the sake of exposure" (Mr. Justice Brennan, dissenting in *Barenblatt* v. *United States*, 360 U. S. 109, 166) which all agree is not a legislative purpose. This Court's grant of certiorari in *McPhaul* v. *United States*, No. 674, Oct. Term 1959 (see Point 3 in the Petition therein) sufficiently disproves any such sweeping power

[1] See *e.g.*, Petition for Certiorari herein, p. 18.

in the Committee in disregard of the requirements of 2 U. S. C. § 192.

4. The Government misunderstands Petitioner's first point—that his conviction for reliance upon *Watkins* was a violation of 2 U. S. C. § 192 and a denial of due process under the Fifth Amendment: (See Brief in Opposition, p. 8.) We have posed the question as to whether *scienter* is established where Petitioner explicitly relied upon an opinion of this Court.[2]

In response, the Government cites *Sinclair* v. *United States*, 279 U. S. 263, 299, that "a mistaken view of the law is no defense." (Brief in Opposition, p. 9.) That was not a case like the present where the litigant "had a right to repose upon the decision of the highest judicial tribunal in the land", *Harris* v. *Jex*, 55 N. Y. 421, 424, discussed in Cardozo, *The Nature of the Judicial Process*, 147 (1928). If in a period such as that between the two legal tender decisions of *Hepburn* v. *Griswold*, 8 Wall. (75 U. S.) 603, and *Knox* v. *Lee*, 12 Wall. (79 U. S.) 457, "[m]ost courts in a spirit of realism have held that the operation of the statute has been suspended in the interval", Cardozo, *ibid.*, should not this Court give equal consideration to the more troublesome period between *Watkins* and *Barenblatt* when *scienter* is a condition precedent to criminal conviction?

This is an important issue neither squarely raised in the *Wilkinson* or *McPhaul* cases nor indeed ever presented to this Court. Analogous situations in less compelling circumstances have been resolved in favor of defendants. *United States* v. *Mersky*, 80 S. Ct. 459, and *Continental Can Co.* v. *United States*, 272 F. 2d 312 (C. A. 2, 1959). Its

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[2] A most provocative note, *Contempt of Congress and "Pertinency": A Standard of Culpability*, 11 Stanford Law Review 164 (1958), indicates the complexity and substantiality of the point under discussion. See also *Hall, General Principles of Criminal Law*, pp. 359-360 (1947).

resolution in Petitioner's favor would affect the disposition of many similar cases now pending in the lower courts.[3] Hence, the administration of federal justice will be advanced by a considered resolution of the problem.

5. Since the petition was filed herein, this Court granted the petition for certiorari in the companion case of *Wilkinson* v. *United States*, No. 703, this Term.[4] Each petitioner had been subpoenaed to appear in the same House Committee hearings, described as an inquiry into *Communist Infiltration and Activities in the South*. Each was charged with criticism of the House Committee. The connection of each with the Emergency Civil Liberties Committee was a central issue in the hearings. In each case, review of the Committee's Atlanta hearings as a whole would be necessary to determine the existence *vel non* of legislative purpose and pertinency. See *Barenblatt* v. *United States*, 360 U. S. 109, 123-125, 132.

Each relies upon the First Amendment, the lack of legislative purpose and pertinency, and each urges that the decision in *Barenblatt* v. *United States*, 360 U. S. 109, was misconstrued and, alternatively, should be reconsidered. Consequently, there is no reason to treat the cases differently upon applications for certiorari.[5]

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[3] See *e.g.*, *United States* v. *Popper*, D. D. C. Cr. No. 1053-59, *United States* v. *O'Connor*, D. N. J. Cr. No. 232-59 and *United States* v. *Yellin*, D. N. D. Ind. Cr. No. 3023.

[4] Petitioner and Wilkinson were examined consecutively by the House Committee on its *identical* claims of legislative purpose (Hearings *supra*, pp. 2667, 2669, 2681, 2682), were tried consecutively in the District Court and argued their appeals consecutively.

[5] The denial of certiorari in *Davis* v. *United States*, 361 U. S. 919, is inapposite to the present case. The *Davis* case was indistinguishable from Barenblatt's. He was called in the same investigation. His Petition, although later supplemented, only sought reargument of *Barenblatt*. His later Motion and Reply Briefs do not raise the many important issues presented by Petitioner herein.

We shall not join the Government in speculating as to whether criticism of the House Committee was the principal reason for the grant of certiorari in *Wilkinson*. It is enough that the identical issue is presented by the record herein (R. 33, 135-138, 160-161) and urged in the Petition herein [Pet., Questions Presented, No. 2-(ii)]. Further, Petitioner has raised several fundamental issues neither manifest in *Wilkinson* nor ever before decided by this Court. [See, *e.g.*, Petition herein, Questions Presented, Nos. 1 and 2 (ii) (iii) and (iv).]

Nor is the similarity of several legal issues in the two cases reason for deferring consideration of this petition. See this Court's grant of certiorari in *Taylor* v. *McElroy*, 358 U. S. 918, notwithstanding the prior grant in *Greene* v. *McElroy*, 358 U. S. 872.[6] Since the issues here presented are broader than in *Wilkinson*, there is no advantage in the proposed reduction of Petitioner to the status of an *amicus curiae*. Inherent in this Court's analysis of the facts in *Barenblatt* is a recognition that where constitutional rights are involved each petitioner is entitled to the most careful scrutiny of his individual record to determine where the "balance" of interest lies.

The Court below was of the opinion that Wilkinson's alleged activities "presented a more direct threat to the national security than those of which Barenblatt [and presumably Petitioner] was suspected." *Wilkinson* v.

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[6] See also the grant of certiorari in (1) *Dayton* v. *Dulles*, 355 U. S. 911, after the grant of certiorari in *Kent & Briehl* v. *Dulles*, 355 U. S. 881; (2) the grant of certiorari in *Quinn* v. *United States*, 347 U. S. 1008; *Bart* v. *United States*, 347 U. S. 1011; and *Emspak* v. *United States*, 346 U. S. 809; and (3) the grant of certiorari in both *Abramowitz* v. *Brucker*, 354 U. S. 920 and *Harmon* v. *Brucker*, 353 U. S. 956.

In *Taylor* v. *McElroy*, *supra*, the Government consented to certiorari, by-passing the Court of Appeals, and noted, with much citation, "that the Court has granted such petitions in cases where the same issue was already before the Court in another case" (Memorandum for the Respondents, p. 5).

United States, 272 F. 2d 783, 787. For his was a refusal to answer any questions whatsoever. Without concurring in the lower Court's observation, we submit that where conduct so characterized has received the protection of this Court's review it would be most strange if Petitioner's more limited opposition to the Committee were denied review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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